

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Region 20, Subregion 37

OCEANIC TIME WARNER CABLE	)	
	)	
Employer,	)	
	)	
and	)	
	)	
LOCAL 1186, INTERNATIONAL	)	No. 20-RC-145340
BROTHERHOOD OF ELECTRICAL	)	
WORKERS, AFL-CIO	)	
	)	
Union.	)	
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**EMPLOYER OCEANIC TIME WARNER CABLE'S BRIEF  
IN SUPPORT OF EXCEPTIONS TO THE HEARING  
OFFICER'S REPORT ON CHALLENGED BALLOTS**

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Pursuant to Section 102.69 of the Rules and Regulations of the National Labor Relations Board ("Board"), the Employer, Oceanic Time Warner Cable ("Company" or "Employer"), by and through its attorneys, the Law Office of Daniel Silverman LLP and Watanabe Ing LLP, excepts to the Hearing Officer's Report on Objections ("Report") issued on May 14, 2015.

**I. Background**

This matter is before the Board as a result of a petition filed by the International Brotherhood of Electrical Workers, AFL-CIO, Local 1186 ("Union" or "IBEW") on January 29, 2015 seeking to represent a unit of employees located at Oceanic's facility at 73-4873 Kanalani Street, Kailua-Kona, Hawaii 96740 ("Kona facility"). The petition sought the following unit:

**Included**

Production and Maintenance employees performing work related to construction, installation, maintenance and service in the Cable Communication Industry

**Excluded**

Office clerical, professional, employees, guards, watchmen and supervisors other than foreman

(Board Exh. 1(a)).

Subsequently, on February 5, 2015, Oceanic and the IBEW entered into a Stipulated Election Agreement listing the unit and eligible voters as follows:

**Included:** All production and maintenance employees performing work related to construction, installation, maintenance and service in the Cable Communication Industry based at the Employer's Kailua-Kona facility.

**Excluded:** Office clerical employees, professional employees, guards, watchmen, and supervisors as defined by the Act.

(Board Exh. 1(b)).

On March 12, 2015, an election was held at the Kona facility in which sixteen (16) ballots were cast for the IBEW and fifteen (15) ballots were cast against the IBEW. Two (2) challenged ballots were also cast by employees Charles Peterson, the only Outside Plant Engineer (“OSP Engineer”) at the Kona facility, and Cora Bush, the only Dispatcher at the Kona facility. Since the challenged ballots are determinative to the outcome of the election, a hearing to resolve the challenged ballots was held on April 24, 2015 before Hearing Officer Trent Kakuda in Kona, Hawaii. The sole purpose of the hearing was to determine whether the OSP Engineer and the Dispatcher should appropriately be included in the bargaining unit at issue at the Kona facility.

On May 14, 2015, the Hearing Officer issued his Report on Challenged Ballots recommending that the OSP Engineer and Dispatcher not be included in the stipulated unit and that the challenges to their ballots be sustained. With respect to the OSP Engineer, the Employer agrees with the Hearing Officer’s recommendation that he not be included in the stipulated unit. With respect to the Dispatcher, the Hearing Officer based his recommendation solely on his finding that extrinsic evidence indicates the Parties did not intend to include her in the stipulated unit. As discussed below, the Hearing Officer erred in determining that the Dispatcher is not included in the stipulated unit.

## **II. Arguments in Support of Employer’s Exceptions**

### **A. The Hearing Officer Erred in Finding that the Stipulated Unit Description is Ambiguous Despite the Plain Meaning of the Unit Description Which Includes the Dispatcher**

In the Stipulated Election Agreement, the Parties expressly agreed to include

“[a]ll production and maintenance employees performing work related to construction, installation, maintenance and service” at the Kona facility, and to exclude “[o]ffice clerical employees” along with other traditional exclusions (emphasis added). The plain meaning of the unit description includes the Dispatcher as it is well established that the Board traditionally treats dispatchers as “production and maintenance” employees who “serve, albeit in a more vital capacity, much the same purposes as any member of . . . [a] unit of production and maintenance employees.” Arizona Public Service Co., 182 NLRB 505 (1970), *overruled on other grounds* (where the Board concluded that the employees performing dispatch work “should be represented, if at all, as a part of the existing unit of production and maintenance employees”).

An objective reading of the language of the stipulation establishes that Ms. Bush should be included in the bargaining unit because she is a production and maintenance employee performing work related to construction, installation, maintenance and service. As the only Dispatcher at the Kailua-Kona facility, Ms. Bush monitors, assists, and directs the movements of the other production and maintenance employees, performing work essential, integral, and directly related to construction, installation, maintenance and service. See, e.g., Connecticut Light & Power Co., 121 NLRB 768, 769-70 (1958). While the Dispatcher classification is not specifically listed in the unit inclusions, neither are any of the other included classifications such as installer, installer technician, service technician or maintenance technician specifically listed. Rather, the plain meaning of the language of the stipulated unit confirms the inclusion of the Dispatcher based on the Board’s traditional holding that dispatchers are indeed production and maintenance employees. See e.g., Yale & Towne Mfg. Co., 112 NLRB 1268 (1955).

Moreover, the language of the stipulated unit only expressly excludes “office

clerical employees,” which further indicates that Dispatchers, who are well established plant clerical employees, are properly included as part of the production and maintenance employee unit. The Board has held that employees performing dispatching duties are not “office clerical employees,” and thus will not be considered office clerical employees when interpreting the language of a stipulation agreement. In Desert Palace, Inc., dba Caesars Tahoe, 337 NLRB 1096 (2002), the Board held that the hearing officer erred in finding that the express language of the stipulation excluding “office clerical employees” reflected an intent to exclude an “engineering coordinator” who performed dispatching and other duties for maintenance engineers. The Board held that the coordinator could not be excluded from the unit based on the language of the stipulation excluding “office clerical employees” because he did not perform office clerical work but instead performed plant clerical work including dispatch. Id. The Board emphasized that it “has long drawn a distinction between ‘plant clericals’ and ‘office clericals,’” and that “dispatching duties have been found to be plant clerical in nature.” Id. Thus, the term “office clerical employees” could not be read to include an employee performing dispatch duties. Id.; Yale & Towne Mfg. Co., 112 NLRB 1268 (1955) (where the Board stated that it “is not bound by stipulations of parties to representation proceedings where the record facts disclose an inconsistency between the stipulation and established Board policy,” and held that dispatchers should be excluded from the office clerical unit because they are plant clerical employees which the Board “customarily includes in production and maintenance units and excludes from office clerical units”); Koehring S. Co., 108 NLRB 1131 (1954) (where the Board held that the dispatcher, as a plant clerical employee, should be excluded from the “office clerical employee” unit, and emphasized that it has “declined to establish single units combining office and plant

clerical employees where the issue is raised by the parties”). Accordingly, the Parties’ agreement to expressly exclude “office clerical employees” without also excluding “plant clerical employees” would confirm that the Dispatcher in Kona, consistent with well established Board law, is a production and maintenance employee performing work related to construction, installation, maintenance and service who is properly included in the unit.

Thus, the Hearing Officer erred in finding that the stipulated unit description is ambiguous where it covers *all* production and maintenance employees, which certainly includes the Dispatcher.

**B. The Hearing Officer Erred in Finding that Extrinsic Evidence Indicates the Parties Did Not Intend to Include the Dispatcher in the Stipulated Unit, Despite Mr. Akamu’s Admission that He Intended to Include Everyone In the Unit Except Those Specifically Excluded, Which Would Include the Dispatcher**

The Hearing Officer determined that the Dispatcher should not be included in the stipulated unit based solely on his erroneous finding that extrinsic evidence indicates that the Parties did not intend to include the Dispatcher in the stipulated unit. (Report at 31). The Hearing Officer primarily based his finding on: (1) the similarities between the inclusion and exclusion provisions of the stipulated unit and those of the Oahu and Maui blue-collar collective bargaining agreements (“CBAs”), and (2) his inference that the Parties were actually referring to the language in these CBAs as the basis for the stipulated unit, and thus “the Parties’ historical understandings were logically intended to apply to the instant stipulated unit as well.” (Report at 28-29). As discussed below, the Hearing Officer erred in these findings because they fail to take into account significant material facts.

Contrary to the Hearing Officer’s finding, the CBAs at Oceanic’s separate

facilities support a finding that the Parties intended to include the Dispatcher in the stipulated unit. While there are indeed similarities between the stipulated unit and the language in the Oahu and Maui blue-collar CBAs, this simply indicates that the Parties intended to include all production and maintenance employees performing work related to construction, installation, maintenance and service at the Kona facility in the unit. This does not mean that the Parties intended to disregard the factual realities of the Kona facility in determining which positions actually constitute such production and maintenance employees based on Kona's operations and the nature of the work performed by each position there. Whether the Dispatchers on Oahu and Maui are or are not treated as "production and maintenance employees performing work related to construction, installation, maintenance and service" at their specific facility is immaterial to the analysis of whether or not the Dispatcher in Kona is a production and maintenance employee where there is no testimony or evidence as to what the Dispatchers on Oahu and Maui do. The similarity in language is not at all applicable or relevant to determining what positions constitute production and maintenance employees at one facility versus another. To assume or infer that the Parties intended to exclude the Dispatcher from the unit based on a purported "historical understanding" of their exclusion on Oahu and Maui would render the plain language of the stipulated unit meaningless where the Dispatcher in Kona indeed is a production and maintenance employee performing work related to construction, installation, maintenance and service. If that were the Union's intent, it would have referenced the applicable included job classifications on Oahu and Maui, rather than language referring to the type of work performed. The Hearing Officer's reliance on the "historical understanding" requires evidence of the specific type of work performed by the Dispatchers on Oahu and Maui, which is entirely absent from the

record. The Hearing Officer's reliance on Mr. Akamu's cursory statement that Dispatchers at other facilities "talk to the guys on the field" and that the installers and technicians in Kona are instructed to call the Oahu Dispatchers when Ms. Bush is out of the office is entirely insufficient to overcome the plain language of the stipulated unit and to *de facto* conclude that the Dispatcher on Kona should not be included simply because Dispatchers on Oahu and Maui are not. (Report at 31). Moreover, both the Oahu and Maui blue collar bargaining units were established by a predecessor of the Employer, and thus no such "intent" or "historical understanding" regarding the inclusion of Dispatchers in the units on Oahu and Maui can or should reasonably be imputed to the Employer.<sup>1</sup>

Further, Mr. Akamu's testimony and actions contradict the Hearing Officer's finding the Parties' historical understandings were intended to apply to the stipulated unit. Mr. Akamu admitted that he told Meredith Burns, the Board Agent, that he wanted **all** Kailua-Kona employees in the unit, except the employees specifically excluded:

Q [Employer's Counsel]:      Beginning that -- with that sentence, did -- now let me ask you again. Do you recall telling Ms. Burns that what you wanted were all the unrepresented -- everybody at the facility, except those specifically excluded? Isn't that what you told Ms. Burns?

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<sup>1</sup> Mr. Akamu testified that he was not part of the petition to establish these separate units on the other islands (Tr. 95), and the bargaining units and CBAs were already in place when he started his position in 2002 (Tr. 105). Moreover, Mr. Akamu believes that Oceanic was not the employer when these bargaining units and CBAs were established, and that it was a predecessor employer who entered into the CBAs with the Union (Tr. 105-106). When recognition of these other units was granted, he was not aware of what the Dispatcher position was doing on Oahu or Maui (Tr. 106). Mr. Akamu also has no knowledge of what agreements were made between the employer at the time and the Union (Tr. 106).



A [Peter Akamu]: I'm not a hundred percent sure what -- what I said. I mean, I can't really remember word for word.

Q: No, I'm --

A: Yeah. I mean . . .

Q: I'm not asking for word for word. **But generally, that was --**

A: Yeah.

Q: **-- essentially your position, is that you wanted everybody who was -- except the ones that you specifically excluded; the office clerical employees and all those who --**

A: **Yes.**

Q: But everybody else, you wanted in.

(Tr. 119-120) (emphasis added). Based on this testimony, Mr. Akamu clearly admits that, while he cannot recall word for word what he told the Board Agent, it was his position that he wanted all employees, except those specifically excluded, in the bargaining unit. This testimony is inconsistent with the Hearing Officer's finding that the Parties' alleged historical understandings were intended to apply to the stipulated unit. At the very least, this testimony certainly creates ambiguity as to the Union's intent.

Moreover, the position of Mr. Akamu and the Union with respect to the OSP Engineer likewise entirely contradicts the Hearing Officer's finding that the Parties' alleged historical understandings were intended to apply to the stipulated unit. Mr. Akamu testified that

Mr. Peterson is an OSP Engineer and that OSP Engineers on Oahu are not a listed classification in the Oahu blue collar bargaining unit (Tr. 99-100; U. Exh. 2). Despite the Union's position that the OSP Engineer should be included in the unit, Mr. Akamu verified that there are no OSP Engineers included in any of the Union's blue collar bargaining units at Oceanic's other locations, and testified that Mr. Peterson is not in a position that is included in any of the other blue collar bargaining units on Oahu or Maui (Tr. 101). Mr. Akamu's intent to include the OSP Engineer position in the Kona unit, despite its exclusion from the Oahu and Maui blue collar bargaining units, further evidences that the Hearing Officer erred in finding that the Parties' alleged historical understandings were intended to apply to the instant stipulated unit.

Further, the Hearing Officer erred in finding that the Employer's omission of Ms. Bush's name from the eligibility list "appears to be consistent with [his] ultimate finding that the Parties' intended not to include Bush in the stipulated unit." (Report at 31). It cannot be disputed that the Employer's intent, in agreeing to the stipulated language, was to include "[a]ll production and maintenance employees performing work related to construction, installation, maintenance and service" at the Kona facility. This is the language of the stipulation that the Employer agreed to. The Employer made the representation on the record that Ms. Bush was not included on the eligibility list because the person who prepared the list was not familiar with the Kona facility and operations. The fact that the individual was not aware of the nature of Ms. Bush's work and the Kona operations and hence did not include her on the list, does not evidence that Parties intended to exclude her where in fact she is a production and maintenance employee performing work related to construction, installation, maintenance and service. By analogy, if the Employer failed to include a maintenance technician on the list, this would not evidence the

intent to exclude such employee from the unit, as opposed to oversight. Likewise, the omission of any production and maintenance employee, including the Dispatcher, can only be treated as an oversight.

Accordingly, the Hearing Officer erred in finding that extrinsic evidence indicates that the Parties did not intend to include the Dispatcher in the stipulated unit. The extrinsic evidence indicates that the Parties intended to include all production and maintenance employees performing work related to construction, installation, maintenance and service at the Kona facility, and the record is clear that this includes the Dispatcher.

**C. Alternatively, the Hearing Officer Erred in Not Moving to the Community of Interest Test to Establish that the Dispatcher is Appropriately Included in the Unit**

The Hearing Officer erred in not crediting Mr. Akamu's admission that he intended to include all employees at the Kona facility, except those specifically excluded, in the unit. At the very least, this admission confirms that the Parties' intent is unclear and therefore the community of interest test must be applied. The record establishes that Ms. Bush shares an overwhelming community of interest with the other employees in the stipulated unit.

There was significant evidence of the fundamental and indispensable role Ms. Bush plays in the performance of work related to construction, installation, maintenance and service at the Kona facility, and her shared community of interest with the other production and maintenance employees. The only testimony regarding the work performed by Ms. Bush and the other production and maintenance employees came from Mr. Lucas, the Installation Supervisor who Ms. Bush reports to. The Union did not attempt to dispute Mr. Lucas' testimony, and the Hearing Officer credited and summarized much of Mr. Lucas' testimony in his Report.

There is well established case law to support the fact that employees performing dispatch work for production and maintenance employees share an overwhelming community of interest with such production and maintenance employees by virtue of their work. In Arizona Public Service Co., 182 NLRB 505 (1970), *overruled on other grounds*, the employer, a public utility company engaged in the generation and distribution of electric power, had a bargaining agreement with the union covering all “production and maintenance employees.” In determining that the dispatch employees would be appropriate as part of the “production and maintenance employee” bargaining unit, the Board stated that while the dispatch employees “have separate skills from those exercised by other unit employees . . . their duties are integrated, through intermediate personnel, with those of the field employees of the Employer.” Id. The Board concluded that the dispatchers “serve, albeit in a more vital capacity, much the same purposes as any member of the presently represented unit [i.e., production and maintenance employees].” Thus, the Board concluded that the dispatchers “should be represented, if at all, as a part of the existing unit of production and maintenance employees.” Id.

Likewise, in Connecticut Light & Power Co., 121 NLRB 768, 769-70 (1958), the Board held that dispatchers should appropriately be part of a bargaining unit covering production and maintenance employees at a public utility company engaged in the production and distribution of gas and electricity. The dispatchers at issue were responsible for coordinating all loading operations throughout the entire system and were “in constant contact, by telephone, with power station and substation personnel to whom they give instructions and orders to increase or decrease use of generating facilities to meet changing demands for power.” Id. In finding that the dispatchers should be part of the production and maintenance employee

bargaining unit, the Board emphasized that “[i]n cases involving other power companies the Board has previously considered the status of load dispatchers who performed similar duties under circumstances comparable to those of the load dispatchers here involved and in each instance found, in the absence of authority to change or effectively recommend the change in status of employees, that the load dispatchers were not supervisors . . . . [i]n fact, in all instances where there has been a dispute as to the unit placement of load dispatchers, the Board has included them in the production and maintenance unit.” Id.

In Browning Ferris, Inc., 275 NLRB 292 (1985), the Board disagreed with the hearing officer’s finding, and concluded that a dispatcher shared a community of interest with the employer’s drivers and helpers. The Board noted that on occasion “two swing drivers [unit employees] also perform dispatching functions in the dispatch area,” and that the dispatcher has “frequent contact” with the drivers throughout the day. Id. In the morning, the dispatcher distributed “logs or route sheets to the drivers,” and also communicated with them over the company radio or telephone with respect to extra and/or missed stops and emergency stops. Id. The dispatcher was also in the same department as these drivers. Accordingly, the Board held that the dispatcher shared a community of interest with the drivers such that he should be included in the unit. Id.; Minneapolis-Honeywell Regulator Co., 115 NLRB 344, 346 (1956) (stating that dispatchers have been found by the Board in previous decisions to “be plant clerical employees and have been included in production and maintenance units”); Rohr Aircraft Corp., 104 NLRB 499, 502 (1953) (stating that “[i]n accordance with the Board’s policy,” it would include dispatchers “with other plant clerical employees in the production and maintenance unit”).

As explained below, the record is clear that Ms. Bush likewise has frequent contact with the Installers, Installer Technicians, Service Technicians, and Maintenance Technicians (hereinafter collectively referred to as “Field Reps”) who interact with and depend on her throughout the day such that her shared community of interest with them cannot reasonably be disputed. To exclude the Dispatcher from this unit would result in her being the only unrepresented non-supervisory production and maintenance employee performing work directly related to construction, installation, maintenance and service at the Kona facility, and the only unrepresented non-supervisory employee in her department, a result the Board seeks to avoid. See Desert Palace, Inc., supra p. 1101 fn. 16.

In this case, there is a functional integration between the Dispatcher and Field Reps, and the Dispatcher is essential to the performance of their work. Ms. Bush has direct contact with the Field Reps on a daily basis all throughout the day, and she has an understanding of the skill level of the Field Reps and what they can do in order to perform her job (Tr. 18; 36-37). She assigns work in the morning, makes sure that the work orders are given to specific Field Reps, and monitors the Field Reps throughout the course of the day to ensure that their jobs are completed, to determine if they need assistance, to verify location/address information, assist if additional equipment is needed, and to monitor the status of jobs (Tr. 18-20). Her communication with the Field Reps is continuous, and she is like the “hub” for the Field Reps (Tr. 20). Ms. Bush also is the person responsible for making the calendar for the Field Reps so that jobs can be scheduled (Tr. 18-19).

The Field Reps contact Ms. Bush if they need to be out that day and she works with Mr. Lucas to ensure that there is sufficient coverage (Tr. 18). She also has direct face-to-

face contact with the Field Reps every Tuesday at the Kona office during the hour long “field meetings,” and when she physically hand delivers the Intelligent Home and Business Class work orders to the various Field Reps (Tr. 16-17; 57-59). Put simply, without Ms. Bush, the Field Reps would not be able to perform their work as they would not have their routes, assignments and work orders to service customers.

Further, the Dispatcher and the Field Reps are part of the same department and have common supervision. The Dispatcher and the Field Reps are all in the Technical Operations Department in Kona managed by Kauhi Keliiaa. All other non-supervisory employees in the Technical Operations Department in Kona are in the stipulated bargaining unit (Emp. Exh. 1). Ms. Bush directly reports to Patrick Lucas, Installation Supervisor, who reports to Mr. Keliiaa, and all employees under Mr. Lucas are in the stipulated bargaining unit (Tr. 17; Emp. Exh. 1).

Additionally, the Dispatcher and the Field Reps share similar overall functions and goals, i.e., ensuring that customers’ cable service installation and repair needs are coordinated and addressed. Patrick Lucas, the Installation Supervisor, performs her dispatching duties in the morning when she is out sick or on vacation (Tr. 21-22). Ms. Bush is also required to attend the technical operations meetings with the Field Reps where they discuss policies and procedures, as well as other issues, affecting their department (Tr. 16; 46).

Accordingly, it is clear that Ms. Bush shares an overwhelming community of interest with the Field Reps, and the Union did not present any evidence to refute this.

### **III. Conclusion**

For the foregoing reasons, the Employer requests that the Board reject the

Hearing Officer's Report on Challenged Ballots and include the Dispatcher in the stipulated unit.

DATED: Honolulu, Hawaii, May 28, 2015.

A handwritten signature in black ink, appearing to read "Daniel Silverman", written over a horizontal line.

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Attorneys for Employer

OCEANIC TIME WARNER CABLE



**CERTIFICATE OF SERVICE**

This is to certify that on this 28<sup>th</sup> day of May 2015, I have served a true and correct copy of **EMPLOYER OCEANIC TIME WARNER CABLE'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS** in Case No. 20-RC-145340 via electronic filing through the National Labor Relations Board's website, [www.nlr.gov](http://www.nlr.gov) upon:

National Labor Relations Board  
1099 14<sup>th</sup> St. N.W  
Washington, D.C. 20570-0001

A true and correct copy of **EMPLOYER OCEANIC TIME WARNER CABLE'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON CHALLENGED BALLOTS** was also served on this 28<sup>th</sup> day of May 2015 via email and U.S. mail, postage prepaid, addressed to the following:

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DATED: Honolulu, Hawaii, May 28, 2015.

A handwritten signature in black ink, appearing to read "Daniel Silverman", written over a horizontal line.

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